# Supreme Court of the United States

**OCTOBER TERM, 1942.**

**No. 571**

In the Matter

of

SURF ADVERTISING CORPORATION,

*Debtor.*

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MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,

*Petitioner,*

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

DAVID HAAR,
*Attorney for Petitioner.*

THE COURT PRESS, N. Y. C.

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## Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

*To the Honorable the Chief Justice and to the Associate Justices of the Supreme Court of the United States:*

Your petitioner, Max Rockmore, as Trustee in Bankruptcy of Surf Advertising Corporation, Debtor, respectfully submits this petition for a writ of certiorari, for the purpose of bringing up to this Court for review a decision of the United States Circuit Court of Appeals for the Second Circuit.

As will presently appear from a recital of the facts, the controversy centered on the claim of respondent Joseph S. Abrams, that he was entitled to a fund in court. Respond-

ent Mathilde Lehman claimed only part of the fund. Your petitioner claimed he was entitled to the whole fund as Trustee of the Debtor in reorganization. The respondent Abrams' claim was based on the assertion of an "equitable lien" by virtue of certain contracts for display advertising assigned to him by the Debtor as security for advances. The fund represented the proceeds of performance of those contracts by the Debtor while it was insolvent, and performance by your petitioner as Trustee. Lehman asserted no assignment from the Debtor. Her claim to an "equitable lien" was based on an assignment of one of the contracts from an assignor of the Debtor, who originally had owned the contract, and had borrowed money on it from her.

By the decision and order sought to be reviewed (R. 374), the Circuit Court reversed its former decision (R. 329), and affirmed an order of the District Court, which it had previously reversed (R. 329). The first decision (of reversal) was not unanimous. Circuit Judge Clark dissented. In his opinion (R. 336) he suggested neither affirmance nor reversal, but indicated a desire "to return the case to the Court below for a more complete record, as well as more extensive investigation of the issue which seems to me controlling" (R. 338).

Reargument was requested by the respondents (R. 339, 342). On that reargument briefs were filed in support of a rehearing by various banking institutions, and by Reconstruction Finance Corporation, all appearing as *amici curiae* (R. 370). The Court below allowed the latter to file briefs, on their contention that the point of law involved was of the utmost importance to banking institutions in general, since the decision first made might seriously affect many bank loans which had been made on the strength of accounts receivable not then in existence, but which were to be created in the ordinary course of

business of the borrower. It was urged that if the decision stood unaltered, the bank loans were endangered, in the event that bankruptcy of the borrower intervened before the loans were repaid.

The Court considered the matter on briefs alone, treating the petition for a rehearing as granted, and thereupon reversed its former decision (R. 371). The Court adopted the views expressed by Judge Clark in his dissenting opinion "in general" (R. 371), but did not go as far as Judge Clark wanted to go, viz., to send the case back for further facts. Judge Clark had suggested the need of "a record containing definite findings as to whether these assignments were outright or for security" (R. 338). "It may well be," Judge Clark added, "that differing results may be reached in the two cases before us" (R. 338).

Besides these opinions in the Circuit Court, there was an opinion by the District Court, Hon. Vincent L. Leibell (R. 313) and also an opinion by the bankruptcy Referee, Hon. Robert P. Stephenson (R. 310). The District Court affirmed the Referee's order, but did so on a different interpretation of the inferences deducible from the facts. Since no findings were made by the Referee (the original trial Court) it will be helpful to designate the different factual inferences, and legal conclusions drawn therefrom, expressed in each of the five opinions that have been written in this case by appropriate reference, to wit: Referee Stephenson's opinion—"Ref. Op. R. "; Judge Leibell's opinion, "D. C. Op., p. "; the Circuit Courts' first majority opinion, "1st Maj. Op., R. "; Judge Clark's dissent, "Disntg. Op., R. "; the Circuit Court's opinion after reargument reversing its previous decision (now sought to be reviewed) "Reargt. Op., R. ".

## Jurisdiction.

The order of affirmance was entered in the Circuit Court of Appeals on September 8, 1942 (R. 374). The jurisdiction of this Court is invoked under Section 240a of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. Section 347a).

## Statement of Controversy.

The controversy was in the nature of a suit in equity tried before a Referee in bankruptcy, to determine the right to a fund of $5960 deposited in Court by Calvert Distillers Corporation. There were nine claimants to the fund (R. 8). Three were ultimately left to dispute its possession in the Circuit Court. Your petitioner claimed it because it represented moneys due to the Debtor, and to him as Trustee, for the performance of an advertising contract between Calvert and Surf, the Debtor (R. 6). Respondent Abrams claimed the money by reason of assignments by the Debtor to him of these contracts, not for performance, but as "sales" (R. 12). On reargument he changed his position and called the transaction "equitable assignments" under which "all rights of Surf passed immediately to Abrams" (R. 355).

Lehman's claim stands on a different footing. She did not claim the whole fund. She did not claim any assignment from the Debtor. She claimed an assignment from a predecessor of the Debtor, which had assigned one of these Calvert contracts to her, as security and later assigned that same Calvert contract to the Debtor.

Disregarding the differing views expressed by the Referee and the District Court as to the nature of the transactions, the Circuit Court ruled that the assignments "were given both to Abrams and Lehman as security"

(First Maj. Op., R. 332). Judge Clark refused to place any legal label on either transaction, preferring to know more about the facts (Disntg. Op., R. 338).

Lacking findings of fact, which Judge Clark thought essential to a proper determination of the issues involved (Disntg. Op., R. 338), we shall have to accept the Circuit Court's view, as originally expressed, that "Abrams' rights were those of a secured creditor and that Lehman had similar rights" (First Maj. Op., R. 334, 335). That view was not altered in the Court's decision on reargument. Indeed, that relationship of a "secured creditor" to the Debtor-borrower was emphasized in the second opinion (Reargt. Op., R. 372).

The Court changed its views as to the legal consequences of that relationship by reason of Judge Clark's opinion as to the New York law on the subject (which he admitted was "none too clear on the point at issue") (Disntg. Op., R. 336—first sentence). The following is the basic opinion of the Court below upon which it reversed itself:

> "Upon a further examination of the authorities we have become convinced that the majority opinion did not correctly interpret the New York law as applied to loans upon bilateral contracts not completely performed on either side, and the view of that law expressed in Judge Clark's dissenting opinion should in general be adopted" (Reargt. Op., R. 371).

## Questions Presented.

Your petitioner respectfully suggests that the issues and questions which this decision presents, are these:

1. Assuming that the "New York law" is applicable to the facts with respect to the claims of both

Abrams and Lehman, was not the Court bound to interpret those facts in the light of the National Bankruptcy Law, as amended in 1938, instead of the "New York Law"?

2. Since the Chandler Act amended the National Bankruptcy Law with respect to "preferences" (Sect. 60a)[1] and in defining "transfers" by insolvent debtors, to creditors (Sect. 1, subd. 30)[1] does not the "New York law" yield to the federal law in the administration of an insolvent Debtor's property by a Court of Bankruptcy?

3. In view of the new definition of what constitutes "transfer" of property (Sect. 1, subd. 30),[1] and when the transfer should be deemed to have been made if possession has not been taken by the transferee before bankruptcy (Sect. 60a),[1] do not the uncontradicted facts justify the first decision awarding the fund to the petitioner, rather than the second decision which deprived him of it?

4. Was not the "New York law", as applied by the Court below, in conflict with Section 70c,[1] since the fund was "in the possession or under the control of the bankrupt at the date of bankruptcy", and, therefore, was impressed with a lien in favor of your petitioner as Trustee "as of the date of bankruptcy", superior to that of the respondents?

These are the more important issues which your petitioner believes the conflicting decisions present, and which this Court should consider and decide, because of their great importance in the administration of bankruptcy estates under the Chandler Act, amending the National Bankruptcy Law as of September 22d, 1938.

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[1] These sections refer to the National Bankruptcy Act, as amended by Congress, effective September 22, 1938.

## Statement of the Facts.

On December 7th, 1939, creditors of Surf Advertising Corporation filed an involuntary petition for reorganization against it in the United States District Court for the Southern District of New York. On December 26th, 1939, your petitioner was appointed by Judge Leibell of that Court, as trustee of the Debtor's affairs. In the interim the Debtor continued its business.

The Debtor, though a corporate entity, was in reality a business conducted by one Samuel Schub, who owned all of its issued stock (R. 25). It had been engaged in the business of outdoor display advertising for a great many years. It owned a number of large display boards in various parts of New York City, upon which national advertisers were solicited to place outdoor display advertisements of their commodities (R. 4). Samuel Schub, the owner of Surf, died on October 3, 1939 (R. 25).

One of the contracts for display advertising, was entered into on May 28, 1937, by the Debtor with Calvert Distillers Corporation. Its life was three years and would have provided a gross income of $17,400 for Surf, upon performance throughout the period of the contract (R. 4). This contract was supplemented by another one on July 28, 1937. It provided for an extension of display services on West Eighth Street and the Boardwalk, Coney Island. Calvert agreed to pay $200 a month for the first year, and $100 a month for the second and third years. In other respects the two contracts were alike (R. 13).

Another contract was entered into with Calvert on September 30, 1937. This related to display advertising on ten deluxe display boards located in New York, Connecticut and New Jersey. These contracts extended over a period of three years beginning with January 1st, 1938.

The total income from performance would have brought $27,000 to Surf, at the rate of $75 a month per board (R. 5).

The respondent Abrams had loaned money to the Debtor in connection with the conduct of its business. He had done so for about six years. The arrangements for loans and repayments were governed by a "master contract" entered into on April 2, 1934 (Ex. 14, R. 272). Generally it provided for advances to be made by Abrams to Surf on various contracts and accounts. Any deficiencies in the collection of moneys under any assignments could be collected out of any moneys that might become due to the assignor out of other assignments. This "master contract" was to cover "all accounts and contracts assigned and to be assigned hereafter" (R. 272, Ex. 14).

All the transactions that Abrams had with Surf were so had pursuant to that so-called "master contract", dated in April, 1934 (R. 248). Abrams' testimony bears this out. When Schub brought the May 28, 1937, contract in, "he made mention that it is subject to an agreement known as the general master agreement". This "master agreement" was the one dated April 2, 1934 (R. 238).

Schub assigned the $17,400 Calvert contract to Abrams on June 2, 1937 (R. 13). At that time, all Schub received was $1000 and a promised $1250 further advance before June 15, 1937. He assigned the supplemental Calvert contract on July 29, 1937 (R. 14). This involved $4800. All Abrams advanced at the time was $1700. The letter contained no promise of any further advances (R. 14). There was also an assignment of a Calvert contract by Surf to Abrams on October 1st, 1937. This involved over $27,000. (The written assignment is not in the record. Abrams had returned it to Schub, but never got it back.) Schub made another assignment on March 23, 1939. This assigned a Calvert contract amounting to $2805, for which

$1650 was advanced at the time (R. 15, 16). (The proceeds of this last mentioned contract was claimed by Lehman, and awarded to her by the Court below.)

No notice of any of these assignments was given by Abrams to Calvert at any time until after October 3, 1939, when Schub died (R. 127). The arrangement was that no notice was to be given (R. 128) but that the monthly checks paid by Calvert as rental were to be turned over to Abrams by Schub (R. 119).

Abrams filed a proof of claim in the bankruptcy court for over $22,000, owing to him by Surf (R. 156). This was alleged to be partly secured and partly unsecured.

After Schub died, a meeting of creditors was called in the office of Max E. Sanders, Esq., one of the attorneys for the petitioning creditors. That was on October 16, 1939 (R. 210). Abrams was present at the meeting (R. 210). Other creditors were also present. It was announced that the total amount of indebtedness owing by Surf was $54,150 (R. 212). Abrams said it was more. The assets consisted only of the contracts for display advertising, many of which had been assigned to five or six different creditors. If the business were to continue, and the moneys realized from the rentals, there would be only about $12,000 left to pay the $54,000 in claims (R. 213).

Abrams admitted that he knew of Surf's insolvent condition in October, 1939 (R. 173). The fund in dispute ($5960) was the result of operations from October, 1939, to July 1, 1940.

On these facts, Referee Stephenson ruled that the transaction with respect to each assignment was a "sale" (Ref. Op., R. 303). He awarded the fund (other than that claimed by Lehman) to Abrams. In the District Court Judge Leibell ruled that "technically there could not be a 'sale' of such a contract; but there could be an assign-

ment of the payments earned by Surf's labors in providing and servicing the signs" (R. 318). He sustained the order on the ground that "Abrams, as assignee, has proved superior and overriding the rights" (Dist. Ct. Op., R. 319).

In reversing this order, the Circuit Court ruled that the assignments were given to Abrams as "security" (R. 332). "Under New York law the assignments and the actual dealings between the parties created no lien against the future instalments which might become payable by Calvert to Surf or Fiegel, but at best, only created an equitable lien which would arise when the payments became due from Calvert" (R. 335).

On reargument, the Circuit Court still referred to the "New York Law" as sustaining its change of position (R. 372). The Court also expressed the opinion that "*we cannot agree with appellant's contention that Section 60a of the present Bankruptcy Act affects our decision,* and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency" (R. 372). (Italics ours.)

Lehman's claim stands on a different basis than that of Abrams. She claims no contract with Surf. She claims no purchase from Surf. Nor did she lend any money to Surf. Her rights, if any, arise from a contract she made with Fiegel Advertising Corp., which then had a contract with Calvert, and which contract was subsequently bought by Surf.

Lehman loaned $1000 to Fiegel on June 8, 1938 (R. 29). At that time Fiegel gave her an assignment of a contract between Fiegel and Calvert for display advertising. A written assignment of the contract was executed. She also received an assignment of the lease of the premises where the display board was located (Lehman Exs. A, B, D; R. 290, 291, 292).

The assignment speaks of "security" for the repayment of the $1000 plus $23 a month for three years (R. 293). This "security" consisted of an assignment of the lease (R. 293) and the contract with Calvert. No notice of the assignment was to be given to Calvert unless there was a default in payment (R. 293).

The contract also provided that Fiegel was to turn over Calvert checks when received, "or at its option, will forward its own check for like amount" (R. 294).

The only payments received were $375 in 1938 (R. 31). Lehman notified Calvert about March, 1939, of the assignment of the contract (R. 31). Calvert made no payments after the notice of March 30, 1939.

In the meantime, Fiegel assigned this May 18, 1938 contract to Surf (R. 36). The date of the assignment is August 8, 1938 (R. 23, Ex. 5 set forth at R. 267). This contract of May 18, 1938, was assigned to Abrams on March 23, 1939 (R. 11).

There is nothing in the evidence to show that the assignment of the lease between Margaret Craig, as landlord, and Fiegel Advertising Co. as tenant, taken by Lehman as security for the $1000 loan (Lehman Ex. D, R. 296) was ever recorded as a mortgage. This is required under Section 230 of the Lien Law, if it is to be valid as a mortgage. (*First Trust & Dep. Co.* v. *Sydelco,* 249 App. Div. 285.)

On this Lehman claim, the Referee held she was entitled to recover both as against the Trustee and Abrams, mainly on the ground that she was a prior assignee, and that "a subsequent transferee gets only what the transferor has left to transfer" (Ref. Op., R. 307).

No consideration seems to have been given to the fact that Surf expended its own labor and money (some of it borrowed from Abrams) and that the Trustee did the same, all culminating in part of the $5960 in dispute.

The District Court affirmed the order subject to deductions by the Trustee for his expenses. Judge Leibell held that Lehman "purchased" an interest in the Fiegel-Calvert contract of May 18, 1938 (R. 320). "Lehman's assignment was not a transfer of property as security" (Dist. Ct. Op., R. 320).

The Circuit Court held the transfer to Lehman was given as *security* (First Maj. Op., R. 332). It agreed with the Trustee's contention that Fiegel "agreed to repay its indebtedness out of a fund to be created in the future" (First Maj. Op., R. 332).

In its opinion after reargument, the Circuit Court made no distinction between the origin of Abrams' rights as distinguished from the origin of Lehman's rights. It reversed itself as to both, based on "New York law", and declined to consider the trustee's point of the applicability of Section 60a of the present Bankruptcy Act (Reargt. Op., R. 372).

Your petitioner's claim to the fund was based on the legal and factual proposition that neither Abrams, nor Lehman, had taken possession of the money at the time of bankruptcy, December 7, 1939. The trustee's claim further was that this fund was created as a result of labor performed and money invested by the debtor prior to December 26, 1939, and also the result of labor performed and money invested by himself as trustee after December 26, 1939, and up to July 1st, 1940.

Your petitioner's rights are based on the provisions of the National Bankruptcy Act as amended in 1938, which gives the trustee the right of a lien creditor under Section 70c, and insofar as the preferences are concerned, declares a transfer to be made *immediately before the filing of the petition* if the transferee has not taken possession of the property at the time of bankruptcy (Section 60a as amended). This contention was expressly disregarded by the Court below (Reargt. Op., R. 372).

## Specification of Errors and Reasons for Granting the Writ.

The Court below erred:

1. In holding that the "New York Rule" applied to the facts in this case in spite of the National Bankruptcy Act as amended in September 1938, which, according to decisions of this Court, supersede all local rules when they are in conflict with the Bankruptcy Act on the subject of title to a bankrupt's property, and the method of its distribution among creditors.

2. In holding that the contracts of assignment in evidence are enforceable as "equitable liens", good against the petitioner, regardless of Sect. 60a of the Bankruptcy Act, which defines the transfer as "perfected" "immediately before bankruptcy". The ruling should be in accordance with the amended Bankruptcy Act that the transfer became "perfected" not of the date of the agreement, but "immediately before the filing of the petition in bankruptcy" (Sec. 60a). At this time both Abrams and Lehman had reasonable cause to know that the debtor was insolvent.

3. As to Lehman's claim, the Court erred in ruling that Lehman had any claim at all against the fund, since there was no contract between the debtor and Lehman, and the mere fact that Lehman obtained alleged rights from Fiegel, by virtue of a prior assignment, does not militate against the effectiveness of the amended Bankruptcy Act with respect to the date of the transfer required to be made under the order—especially since the fund was created with Surf's labor and money and with the Trustee's labor and money.

4. The Circuit Court has decided an important question of federal law which has not been but which should be, settled by this Court.

Legal ground to support these reasons will be found in the brief annexed hereto, with the citation of authorities in support of the argument.

WHEREFORE, your petitioner respectfully prays that the petition for a writ of certiorari should be granted to the Circuit Court of Appeals for the Second Circuit, so that its decision affirming the order of the District Court upon reargument after an original reversal thereof, should be reviewed by this Court.

MAX ROCKMORE,
Petitioner.

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## BRIEF IN SUPPORT OF PETITION.

### POINT I.

**The order of affirmance should be reviewed, because it is based solely on New York law, irrespective of the Bankruptcy Law pertaining to the same subject matter.**

*Prudence Realization Corporation* v. *Geist* (decided April 27, 1942, 62 S. Ct. 978, Advance Sheets of May 15, 1942);

*Jennings, Receiver,* v. *U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 55 S. Ct. 394, 79 L. Ed. 869;

*Yonkers* v. *Downey, Receiver*, 309 U. S. 590, 597, 60 S. Ct. 796, 84 L. Ed. 964.

This Court has occasion to consider a petition for a writ of certiorari to the Second Circuit Court, in the case of *In the Matter of Prudence Co. Inc., debtor.* The basis for the application at the time was that the Second Circuit had rendered a decision in a bankruptcy matter under the mistaken impression that this Court's decision in *Erie Railroad* v. *Tompkins*, 340 U. S. 64, required a Federal Court to apply State law to the facts in that case. The basis of the petition, therefore, was that *Erie* v. *Tompkins, supra,* was not controlling where the question in dispute involved the determination of a Federal law, particularly the National Bankruptcy Law.

This Court granted the writ (315 U. S. — , 62 S. Ct. 439, 86 L. Ed. — . On the argument of the appeal, the order of the Circuit Court was reversed, on the very ground urged in that case, and which is now being urged here. We quote from this Court's opinion on the subject:

> "Nothing decided in *Erie Railroad Co.* v. *Tompkins, supra,* requires a court of bankruptcy to apply such a local rule governing the liquidation of insolvent estates. The bankruptcy act prescribes its own criteria for distribution to creditors. In the interpretation and application of federal statutes, federal, not local law applies (citing cases). The Court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, *Securities and Exchange Commission* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 455, 457, 60 S. Ct. 1044, 1053, 1054, 84 L. Ed. 1293, and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to

which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class. *Cf. Taylor* v. *Standard Gas & Electric Co., supra; Pepper* v. *Litton, supra.*"

The question presented below in this case involved the application of Section 60a of the Bankruptcy Act, coupled with Section 70c and Section 1, subd. 30, of the same Act, as applied to the facts. The Court below, in affirming after reargument, ruled that the New York law applied, relying, principally, upon *Kniffin* v. *State,* 283 N. Y. 317 (Reargument Op., R. 371). It held that "it has long been the New York law that such an assignment is good against a bona fide purchaser even tho the bona fide purchaser is the first to give notice to the obligor. *Fortunato* v. *Patten,* 147 N. Y. 277, 283; *Hooker* v. *Eagle Bank of Rochester,* 30 N. Y. 83. The same thing is true of an execution creditor, or a trustee in bankruptcy. *Harris* v. *Taylor,* 35 App. Div. 462; see for an interpretation of it *Sullivan* v. *Rosson,* 223 N. Y. at page 226; *Conley* v. *Fine,* 181 App. Div. 675, 679; *In re New York, N. H. & H. R. Co.,* 26 F. Supp. 874, 877 (D. Conn.); *Williams* v. *Ingersoll,* 89 N. Y. 508" (Reargt. Op., R. 372).

Relying, as the Court did, upon the New York law, the Court further went on to say *that "We cannot agree with appellant's contention that Section 60a of the present Bankruptcy Act affects our decision* and that there would be any unlawful preference as to any sums paid or payable after knowledge of insolvency" (Reargt. Op., R. 372).

We respectfully submit that, on the authority of this Court's ruling in *Prudence* v. *Geist, supra,* and other cases, that the learned Court below was in error in holding as it did. Section 60a should have been considered by the Court, regardless of the New York law. Section

60a, and the other applicable sections of the Bankruptcy Act, does affect the decision in this case, because the Federal law, being national in scope and requiring uniformity of application supervenes local state law when it comes to matters of bankruptcy administration.

## The Manner In Which Section 60a Affects the Issues.

We have set forth the applicable provisions of Section 60a, and other pertinent sections of the Bankruptcy Law, in the Appendix. The particular portion of Section 60a defines the point of time when a transfer is "deemed to have been made".

> "For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona-fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and, if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under Chapter X, XI, XII or XIII of this Act, *it shall be deemed to have been made immediately before bankruptcy.*" (Italics ours.)

The emphasis of the law is on the word "perfected". It relates to the change of possession of the property in question. That change of possession must be determined within the definition of what constitutes a "transfer" under the law as amended in 1938. We quote the new definition of a "transfer":

> " 'Transfer' shall include the sale and every other and different mode, direct or indirect, of disposing or of parting with, property, or with an interest

therein, or with the possession thereof, or of fixing a lien upon property, or upon an interest therein, absolutely or conditionally, voluntarily or involuntarily, by or without judicial proceedings as a conveyance, sale, assignment, payment, pledge, mortgage, lien, incumbrance, gift, security or otherwise." (Section 1, subd. 30.)

The Court below, in affirming the District Court, held that the transfer by the debtor of the account receivable to be created, was made long before December 7th, 1939, the date of bankruptcy. It came to that decision because of the New York law relating to priority of assignment. But under the present bankruptcy statute, what the Court should have considered was as to when the transfer was *perfected.*

Obviously, the transfer of this fund was not "perfected" either to Abrams, or to Lehman, because it was still in Court, in the Clerk's hands at the time of the inception of the proceedings. Indeed, on December 7th, 1939, when the proceedings in bankruptcy were inaugurated, the money was still in the possession of Calvert Distillers Corporation, who refused to pay anybody because there were so many claimants to the money.

Under such circumstances, the new Act defines the point of time when the transfer is deemed "perfected". We quote:

> *"It shall be deemed to have been made immediately before bankruptcy."*

We respectfully submit that the lower Court should have considered this new provision of the Bankruptcy Act as defining the point of time when the transfer was *deemed to have been perfected,* so as to give possession to Abrams and to Lehman. It should not, as it has done,

disregard Section 60a of the Bankruptcy Act in its consideration of the facts and the law in the case.

That this is important appears quite clearly from the further finding of the Court that Surf was insolvent on December 7, 1939, and that Abrams certainly knew it was insolvent as early as October, 1939, when a meeting of creditors was called to consider what was to be done in view of Schub's death on October 3d, 1939. If the transfer is deemed "perfected" immediately before the filing of the petition, then surely Lehman also knew about the insolvency. That being so, the transfer, "deemed to have been made immediately before the filing of the petition" constitutes a voidable preference under Sections 60a and b of the Bankruptcy Act, regardless of the New York law. As a matter of fact, an examination of the case of *Kniffin* v. *State, supra,* cited to support the decision, indicates that the particular point involved here was not in issue in that case. What was involved in that case was the right of set-off between the State of New York and the trustee in bankruptcy. The state claimed a right of set-off because it had paid an obligation of the bankrupt to the Raymond Company, to which the bankrupt had assigned its claim as a payment for a past indebtedness. The Court of Appeals itself said:

> "In this aspect, the bankruptcy of Earle is unimportant."

We have examined the briefs in the case. Neither side touched the questions that are in issue here. Both argued only the question of the right of set-off, and not the question of the right of a person claiming an equitable lien against the funds of which he did not take possession before bankruptcy, but which then came into the constructive possession of the trustee.

That the question of bankruptcy of the debtor intervening before possession taken is of extreme importance in a consideration of a case of this kind, is clear from the decision of the Second Circuit itself, in the *Matter of Modell,* 71 Fed. (2d) 148 (2d Circt.). In that case, the Court distinguishes *Williams* v. *Ingersoll,* 89 N. Y. 508, one of the cases on New York law cited in the present opinion (Reargt. Op., R. 372). We quote from the decision:

> "The case of *Williams* v. *Ingersoll,* 89 N. Y. 508, holds that an agreement between an attorney and client that the former should have a lien upon all moneys recoverable by the latter in a pending action for malicious prosecution may be effectual as an equitable assignment or lien as against the client and his attaching creditor. *It had nothing to do with bankruptcy of the assignor or the doctrine of relating the lien back to avoid the preference provisions of the statute.*"

This opinion was rendered before the amendment of 1938. That Court likewise expressed the opinion that it is important to consider *the time when possession is taken* with respect to the rights of a trustee as against an assignee:

> "But in New York the rule is otherwise; here *the assignee must take possession before the rights of the assignor's trustee in bankruptcy arise. Zartman* v. *First Nat. Bank* (N. Y. Ct. of App.), 19 Am. B. R. 27, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083; *Mathews* v. *Hardt* (N. Y. App. Div.), 9 A. B. R. 373, 79 App. Div. 570, 80 N. Y. Supp. 462; *Irving Trust Co.* v. *Commercial Factors Corp.* (C. C. A., 2d Cir.), 68 F. (2d) 864. We regard these authorities are controlling."

That the determination of the issues presented by the controversy depends on the enforcement of a Federal law, which cannot be disregarded, and not merely on the interpretation of the New York law, must be clear from an examination not only of the Statute of 1938, but of the Congressional discussions that led up to the amendment.

First and foremost in the minds of the framers of the amendments, was the principle of equality of distribution underlying every insolvency law.

> "Equality of distribution is the key-note of every law dealing with the distribution of estates of insolvent debtors. Thus fraudulent and preferential transfers constitute an important section in the administration of bankruptcy and insolvency laws."
>
> *74th Congress, 2d Sess.* (1936), p. 187, H. R. 12889.

That principle was enunciated only recently by this Court in *Sampsell* v. *Imperial Paper Co.*, 61 S. Ct. 904, at 907.

With that in mind, we present comment in Collier's most recent edition of his Book on Bankruptcy (14th Ed. edited by James W. Moore, Associate Professor of Law, Yale University) with respect to the results sought by Congress in passing the drastic amendments to the Bankruptcy Act, to which we refer in this argument:

> "Moreover, it must be borne in mind at all times that thruout a period of thirty-five years, beginning in 1903, it was fairly evident that Congress intended to strike down secret transfers by establishing a test as to perfection of transfer that would fix the date of notoriety or the transfer as the time when its preferential character should be determined. It

was only the expression of this intent that proved faulty."

(Discussion of Section 60, heading: *"Analysis of Last Sentence of Section 60a,"* p. 892.)

That this was the purpose, is clearly shown in the "Analysis of H. R. 12889" (74th Cong., 2d Sess., 1936, p. 188):

"The new test is more comprehensive and accords with the contemplated purpose of striking down secret liens. We provide that the transfer shall be deemed to have been made when it has become so far perfected that neither a bona fide purchaser nor creditor could thereafter have acquired rights superior to those of the transferee. As thus drafted, it includes a failure to record and any other ground which could be asserted by a bona fide purchaser or a creditor of the transferor, as against the transferee. *We have also added a provision which makes the test effective even though the transfer may never have actually become perfected.*"

That the purpose of this amendment, in its effort to strike down "secret liens" included equitable liens and assignments, is clear from further comment found in Collier on Bankruptcy at page 894:

"The last sentence of Sec. 60a, of the Act of 1938, properly construed, overrules much prior case law, particularly in reference to the effect of lack of recording, *and the doctrine of relation back as applied to possession taken under 'equitable liens and assignments'.*"

A most notable expression of opinion on the intent of Congress in bringing about the amendment under discussion, is that of Professor McLaughlin, who had a great

deal to do with the change in the law. He said, with particular reference to Section 60a, and the intent to strike down secret liens:

> "Furthermore, the phrasing is not limited to secret liens within the recording acts. It is broad enough to cover analogous cases such as those where a judge made 'equitable lien' is invoked to some secret transfers invalid for failure to take the steps essential to a valid transfer at common-law."
>
> "Aspects of the Chandler Bill to amend the Bankruptcy Act."
>
> *University of Chicago Law Review*, p. 369.

We could refer the Court to other portions of the discussion which led to the drastic amendments of Section 60a and the change in the definition of what constitutes a "transfer" under Section 1, subd. 30 of the Bankruptcy Law. It may be sufficient, however, to sum up all of these discussions in the observation made by Professor Moore in Collier's 14th Edition of the Bankruptcy Act. We quote:

> "All of these amendments represented, at least in part, an effort to strike down what might be termed 'secret transfers', that is, transfers executed but not disclosed by recording, or a change of possession, so that creditors were not apprised, until perhaps immediately before bankruptcy, of the transfer or incumbrance relating to the property involved. Such transfers, usually taking the form of a mortgage, lien, pledge or other incumbrance or security device, were often not given notoriety by recording or the like until within four months or less, of the debtor's bankruptcy, when the creditor holding such an incumbrance deemed it advisable to perfect it as far as possible rather than to preserve further secrecy."
>
> *Collier, 14th Ed.*, pp. 868, 869.

This being the state of the law, and the intention of Congress in enacting the amendments to Section 60a relating to preferences; Section 1, subdivision 30 relating to the definition of a "transfer"; and Section 70c relating to the rights of a trustee as a lien creditor as against property of which possession has not been taken prior to bankruptcy, we respectfully submit that the learned Circuit Court was in error in disregarding Section 60a of the Bankruptcy Act in rendering the decision complained of. Considering the New York Law alone was not sufficient. Its duty was to consider the Bankruptcy Act regardless of the New York Law. This Court said so in *Prudence* v. *Geist, supra*, and in other cases.

We therefore respectfully submit that under the circumstances, this is a case in which the petition for a writ is appropriate, and should be granted, so that this Court may review the decision of the Second Circuit, which we believe was erroneous, in view of the amended bankruptcy Law applicable to the facts.

## POINT II.

### The decision sought to be reviewed is in conflict with decisions of other Circuit Courts bearing on the same subject matter of "equitable liens".

If we were to assume that no change whatsoever was brought about in the structure of the Bankruptcy Act by the amendment of 1938, affecting the point at issue, nevertheless, we must come to the conclusion that the learned Circuit Court rendered a decision in this case in conflict with decisions of other Circuit Courts on the same subject matter, to wit, the time when the transfer occurred and its effect on so-called "equitable liens" when the transfer is made at a time when the debtor is in-

solvent, and known to be so by the transferee. Indeed, we might go even further and show that the Second Circuit, in rendering its present decision, apparently has run *contra* to its own decisions in similar cases rendered for years prior to this one.

Of course, cases of preferences always turn on what happened at the time when the transfer was "perfected", that is to say, when possession of the disputed fund was taken by the transferee. If, at that time the bankrupt was insolvent and the transferee knew him to be insolvent, the transfer is ineffective against a trustee, *even in a case of equitable liens.* Under the present law, the point of time of possession taken (lacking actual possession) is "immediately before the filing of the petition" (Sec. 60a). That point is significant here by reason of the fact that *actual* possession was not taken either by Abrams or Lehman before bankruptcy.

Therefore, we believe ourselves justified in stating that, in the intent of the law, possession was deemed to have been taken by Abrams and Lehman immediately before December 7th, 1939. The record is replete with proof, that at that time Surf was insolvent, and that Abrams and Lehman had reasonable cause to know it to be insolvent. The proof also shows that if this money were turned over to Abrams and Lehman, other creditors would get very little, if anything. They certainly would not get as large a percentage of their debts paid as Abrams and Lehman could get. Other Circuit Courts seem to take a different legal view in such a situation, and the present decision seems to be contrary to that of other Circuit Courts.

In the case of *Hayes* v. *Gibson,* 3rd Cir., 279 Fed. 812, the question at issue was the effect of an "equitable lien" as against the rights of a trustee. There, certain barges

and tugs were sold under maritime liens. A balance of over $27,000 resulted and was left in the hands of the trustee in bankruptcy. The fund was claimed both by Hayes and the Trustee. The Court said:

> "The appellant bases his title upon an equitable lien and a chattel mortgage. The court below found that the facts hereinbefore stated created an equitable lien on the boats in favor of the appellant more than four months before the petition in bankruptcy was filed."

The Court then discussed the amendments of 1910 and the decisions under it, and came to the conclusion that in a contest between the trustee and one making claim to an equitable lien arising from an express contract, *such an equitable lien may not be enforced against the trustee.* It said:

> "An agreement made more than four months before a petition in bankruptcy is filed, to mortgage or transfer, is in fact not a mortgage or transfer. The legal title still remains in the owner, unincumbered, at the beginning of the four months' period, and stands pledged under this section of the act for the benefit of all creditors *pro rata.*"

*Hayes* v. *Gibson* (3rd Cir.), 279 Fed. 812.

In the *Matter of Traub* (8th Cir.), 297 Fed. 458, the question related to an oral agreement by the bankrupt to execute a mortgage as security for a debt. The mortgage was finally executed, delivered and recorded within four months before the filing of the petition. The Court held the transfer to be a preference, even though the agreement was made more than four months before the bankruptcy and constituted an equitable lien.

In the case of *Citizens Trust Company* v. *Tilt* (3rd Cir.), 200 Fed. 410, the Court's decision related to "a transfer of security made within four months before the filing of the petition, when the bankrupt was insolvent and known to be so by the transferee". The transfer was declared voidable as a preference. This was so irrespective of the fact that the transfer "was made pursuant to a prior agreement made more than four months before the bankruptcy". This, the Court held, "was not sufficient to deprive the taking of the security within four months before the bankruptcy, of its character as a voidable preference".

Another case in the Eighth Circuit, holding to the same view and opposed to the decision of the Second Circuit now under consideration, is the case of *In re Great Western Mfg. Co.*, 152 Fed. 123.

All of these cases depend on the point of time when the transfer was "perfected". Indeed, the Second Circuit itself so held in the case of *Corney* v. *Saltzman*, 22 Fed. (2d) 268, in the following language:

> "It is when the transfer is made that the effect upon the rights of creditors takes place and becomes known, and not when the agreement to make the transfer is entered into."

The most recent case on the subject in a Circuit Court other than the Second Circuit is in the Fourth Circuit (*Lone Star Cement Corp.* v. *Swartwout, et al., Trustees*, 93 Fed. (2d) 767 (4th Cir.)). That case was decided in January, 1938, before the effective date of the Chandler Act. There the bankrupt was indebted to the cement corporation for various sums of money, and had assigned to it certain accounts receivable which the debtor expected

to be created by work done on various WPA projects. The Government would pay for this work when completed. It was these future created accounts receivable that the cement corporation received by way of assignment and which it sought to enforce.

The Court stated the problem in the following language:

> "The Cement Corporation claims that the agreement described created (1) an equitable assignment of the monies received by the Lumber Company from the United States, impressing them with an equitable lien to secure the payment of the debt, and (2) an assignment of the accounts receivable above described impressing a lien upon them and upon such proceeds thereof as may have been collected or may hereafter be collected by the bankrupt or the representatives of the bankrupt estate."

This problem appears to be exactly like our own. The Court held the equitable lien not well founded as a matter of law. It said:

> "In harmony with these requirements, it is generally held that a mere agreement to pay out of a particular fund does not constitute an assignment of the fund or any part thereof to the promisee, because it amounts only to a mere promise to pay and does not meet the test of an intention on the part of the assignor to give, and of the assignee to receive, present ownership of the fund. *Christmas* v. *Russell*, 14 Wall. 69; *State Central Sav. Bank* v. *Hemmy* (C. C. A. 8th Cir.), 29 A. B. R. (N. S.) 132, 77 F. (2d) 458; *B. Kuppenheimer & Co.* v. *Mornin*, 78 F. (2d) 261; *Pratt Lumber Co.* v. *T. H. Gill Co.*, 278 F. 783; Williston on Contracts, Sec. 428."

In our case, the Referee found it difficult to determine whether the Abrams transaction was a "sale", or for

"security" (Ref. Op., R. 301, 302). He concluded that it was not for security (Ref. Op., R. 302). However, Judge Leibell, in the District Court, held "The referee has found that the transaction between Abrams and Surf amounted to a 'sale' of the debtor's Calvert contracts * * *. Technically, there could not be a 'sale' of such a contract; *but there could be an assignment of the payments earned by Surf's labors in providing and servicing the signs*" (R. 318).

This view was accepted by our Circuit Court in its first decision, as follows:

> "We think that the assignments constituted no more than promises to pay the assignees out of funds to be created by the assignor's labor, which could not withstand the attack of the trustee in bankruptcy. It is manifest that the distribution of the moneys in question to Abrams or Lehman would result in a preference" (R., p. 335).

No formal findings have been made by the Referee or by the District Court. We must assume that the Circuit Court's opinion of the factual relationship with respect to the fund, was in accord with what Judge Leibell held, to wit, *they were mere promises to pay a debt out of future earned income growing out of the contracts.*

In its opinion reversing itself after reargument, the Circuit Court did not change that view of the transaction. It said:

> "This is because the contracts, *and not the moneys accruing under them*, were the subjects of the assignments" (Reargt. Op., R., p. 372). (Italics ours.)

If that is so, and if the moneys accruing under the contracts were *not* the subjects of the assignments, then the

inference is inevitable that all that Surf did was to promise Abrams repayment of loans (made and to be made) out of future earnings resulting from performance of the contracts. That does not constitute an equitable lien, enforceable against a trustee in bankruptcy. Since the Court below says it does, then it appears to be in conflict with the decision of other Circuit Courts on the same subject.

Referring again to the case of *Lone Star Cement Corp.* v. *Swartout, supra* (4th Cir.), that Court held:

> "There is a distinction between a valid equitable assignment, creating a present right in the assignee, and an equitable lien which may arise under some circumstances from a promise to pay a debt in the future out of a particular fund." (Citing cases.)

The important distinction between the two promises, is clearly brought out in this Court's opinion in the case of *Christmas* v. *Russell*, 14 Wall. 69, at 71, 20 L. Ed. 762. This Court said this:

> "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment; a covenant in the most solemn form has no greater effect. * * * The assignor must not retain any control over the fund—any authority to collect, or any power of revocation. If he did, it is fatal to the claim of the assignee."

It seems to us that all that Surf did with respect to the moneys borrowed from Abrams, or which he expected to borrow from Abrams, was to promise to Abrams that as soon as he received payment of rentals from Calvert he would turn the check, or the proceeds, over to Abrams in repayment of the loans. If that is all there is to the case, and we can find nothing else in it, there was no equitable lien; there was merely *a promise to transfer when the funds were collected by Surf.* Since, in this

case the fund in court must be deemed to have been transferred immediately before bankruptcy, then we respectfully submit that the decision affirming the order of the District Court, made in the Second Circuit, is in conflict, not only with well-recognized principles of law affecting the subject matter of the decision, but is also in conflict with decisions of other circuits on the same subject matter in dispute.

Under the circumstances, we respectfully submit that this is a valid reason for granting the petitioner's writ of certiorari.

## POINT III.

### The writ should be issued because the Second Circuit has decided a question of Federal Law, which has not been, but should be, settled by this Court.

The Court's attention is respectfully, and especially, called to the last opinion of the Circuit Court, which reversed its former decision, and the reasons given for such reversal.

> "We cannot agree", said the Court, "with appellant's contention that Section 60a of the Bankruptcy Act affects our decision, and that there would be an unlawful preference as to any sums paid or payable after knowledge of insolvency" (Reargt. Op., R. 372).

It is quite apparent from this statement that there was proof of insolvency of the Debtor, and that there was also proof of knowledge of such insolvency on the part of both Abrams and Lehman, even though, under the present statute, proof of knowledge was not necessary, "reasonable cause to believe" being sufficient.

Now, our contention below was based consistently on our view of the facts in the light of the amendment to the Bankruptcy Law, commonly known as the Chandler

Act, and passed by Congress in 1938. We have already called the Court's attention, in our previous argument, to the need of a federal court, and especially one in bankruptcy, to apply federal law, rather than State law affecting the rights of parties, one of whom is in bankruptcy. We believe that the decision of the Court below which disregarded Section 60a in a consideration of the facts, should not be permitted to stand as an authority, without further careful consideration of the new law by this Court.

That it is important for this Court to consider this case in the light of the Chandler Act of 1938, is perfectly clear from what other Courts have done with regard to the same subject matter in issue.

We have found at least two cases in which this question arose directly since the amendment of 1938, and in which the Courts though of inferior jurisdiction, took the view advanced by the trustee in this case.

In the case of *Matter of Talbot Canning Corporation* (D. C. Maryland), 35 F. Supp. 680, District Judge Coleman had before him a case where a bankrupt had made an assignment to a creditor of accounts receivable to be created in the future, on a contract which he then had, or was about to get. Judge Coleman held such an assignment valid under Maryland law. But Judge Coleman did not stop there. He then considered the effect of the amendment of the Bankruptcy Act in 1938, upon such a transaction wherein there was a claim of an "equitable lien". After discussing the state of the law prior to the Chandler Act, he pointed out that a change has been made by the amendment in Section 60a and 60b of the present Bankruptcy Act. He laid emphasis on the new definition of "transfer", as well as the time when it became "perfected" under the Chandler Act, and while he did not decide the case definitely (sending it back for

further testimony), it seems perfectly clear from the opinion, that Judge Coleman felt constrained to interpret the Maryland law, not as standing by itself, but in the light of the new amendment to the Bankruptcy Act passed in 1938.

This case of Talbot Canning Company came up before the Circuit Court of Appeals in the Fourth Circuit in 1942. It is reported *sub. nom. Associated Seed Growers, Inv.* v. *Geib, Trustee, et al.*, 125 F. Supp. (2) 683. The Circuit Court, considered only the facts and the Maryland law. It found that written assignments had been made by the bankrupt to the creditor in the form of a letter addressed to the brokers, directing them to pay to the Seed Growers the sum of $14,150 on the sale of goods to be manufactured by the bankrupt in the season of 1938. It further found that the assignment was accepted by the brokers in writing, and a copy sent to the Seed Growers.

It also found that there was a present consideration for the assignment and not an antecedent debt, and it thereupon concluded that an essential element of a voidable preference as defined in Section 60a of the Bankruptcy Act, was missing. It reversed the District Court and directed entry of an order in favor of the creditor with respect to the fund.

The Circuit Court did not discuss that part of Judge Coleman's opinion relating to the effect of the new amendment upon transactions of this kind: that is to say, transactions in which an "equitable lien" to a fund is claimed. It evidently did not deem it necessary to do so in view of its findings of fact that, first, there was a present consideration, and hence no antecedent debt, and second, that notice was given of an acceptance of a direction by the bankrupt to pay to the Seed Growers out of the fund to be created.

We are therefore left in the dark insofar as any decisive opinion by a Court of higher jurisdiction is concerned, on a very important question discussed by District Judge Coleman in its opinion, as to the effect of the Chandler Act of 1938 an "equitable liens".

Another District Judge had occasion to say the same thing as Judge Coleman did. *In re Seim Construction Co.*, 37 F. Supp. 855 (D. C. Maryland, 1941). There District Judge Chesnut remarked that "the main purpose of this section of the bankruptcy law under consideration (Section 60) is to protect creditors from secret preferential liens". He further says:

> "The Chandler Act made important changes in Section 60a of the Bankruptcy Act (see 11 U. S., C. A. Section 96a and b). Cum. Pocket Part 1940)."

The Court then sets forth the nature of the changes, putting emphasis on the phrase "perfected" in quoting from the law.

He held that the assignment in that case created an equitable lien, even though it was for a part only of the funds anticipated to come into future existence on an existing contract. But he also held, as did Judge Coleman in the *Talbot Canning* case, that the question must be determined by the Maryland law.

Coming back to a discussion as to the date when the assignment became "perfected" under the present Bankruptcy Law, Judge Chesnut held that while the assignment was dated August 11th, 1939, it did not become "perfected" until after it was filed in the receivership case on December 22d, 1939, and the receiver was appointed. He said that this constitutes the notice to the obligor of the funds and he adds "and certainly no superior rights could thereafter be obtained by anyone because the fund was then paid over to the receiver for account of all whom

it may concern". Judge Chesnut disallowed the creditor's claim as a secured claim. We have not been able to find whether this case went to the Circuit Court.

In the decision of the Second Circuit now sought to be reviewed, in its second opinion the Circuit Court held that the date of the transfer is the date of the assignment, and created an equitable assignment outside the four months period. At the same time it refused to consider Section 60a of the Bankruptcy Act as amended in 1938, and its new definitions of transfer and the date of "perfection" of the transfer.

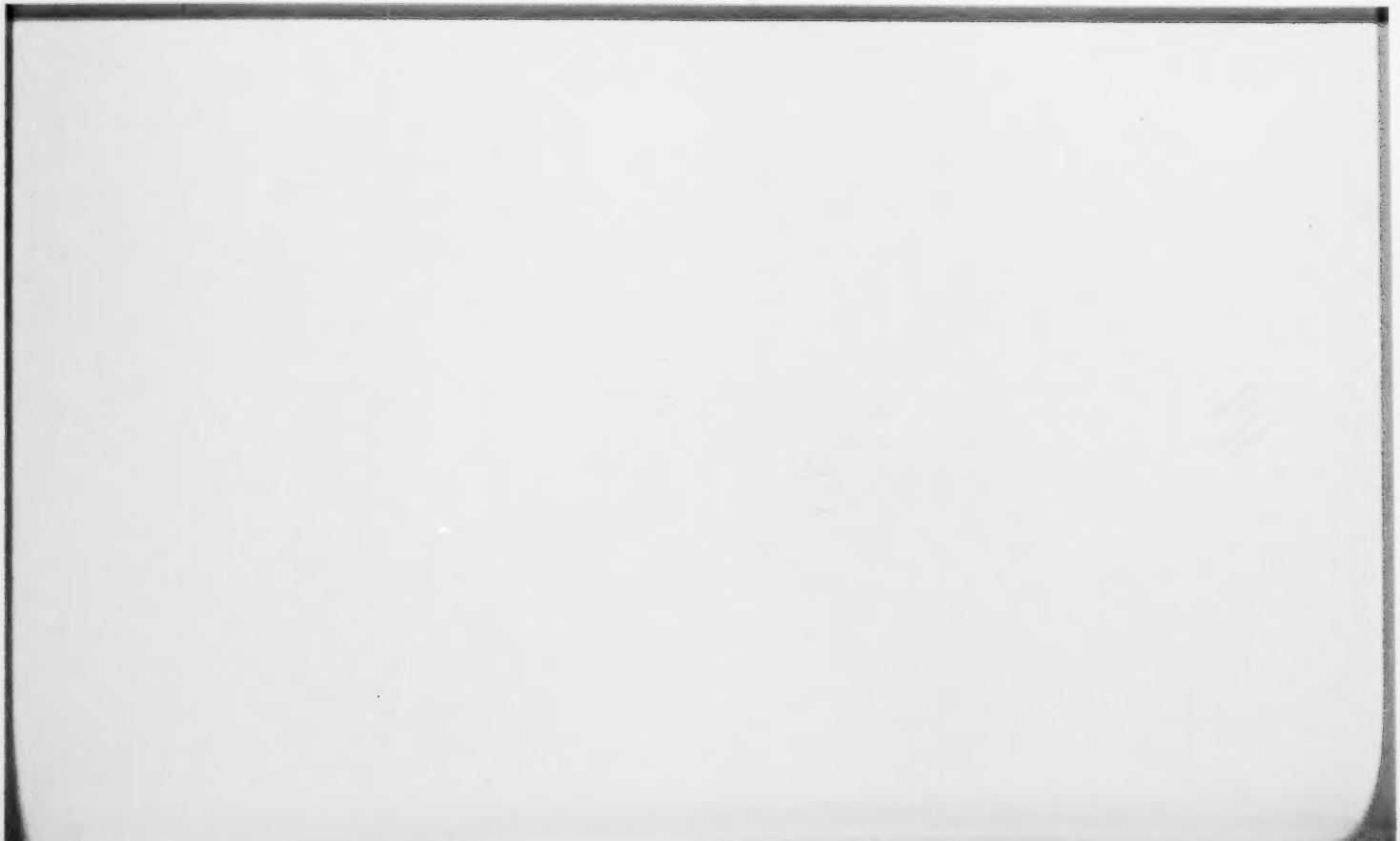
Because of these conflicting views on so important a subject as the interpretation of the new amendment to the Bankruptcy Law, we respectfully submit that the matter is of very great importance, not only to the courts, but to the commercial community. All of us ought to know, by a decision of this Court, whether the intention of Congress to strike down the barrier of secret liens, has been finally achieved by the amendment of 1938, or whether these secret liens shall continue as heretofore, to the detriment of business in general, and particularly, to those who extend credit in ignorance of secret arrangements for security.

## CONCLUSION.

**We therefore respectfully submit that the petitioner has shown good reason for his petition filed herein, and that this Court should grant it, and issue a writ of certiorari to the Second Circuit Court of Appeals, so as to review the order of affirmance following a previous order of reversal in this case.**

Respectfully submitted,

DAVID HAAR,
*Attorney for Petitioner.*



## Appendix.

Section 1, subd. 30—Definition of a "transfer".

"'Transfer' shall include the sale and every other and different mode, *direct or indirect,* of disposing of or *of* parting with *property or with an interest therein or with the possession thereof or of fixing a lien upon property or upon an interest therein,* absolutely or conditionally, *voluntarily or involuntarily, by or without judicial proceedings, as a conveyance, sale, assignment,* payment, pledge, mortgage, *lien, encumbrance,* gift, security *or otherwise.*"

Section 60a—What constitutes a preference.

"A preference is a transfer, as defined in this Act, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition in bankruptcy, or of the original petition under Chapters X, XI, XII, or XIII of this Act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. For the purposes of subdivisions a and b of this section, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, and if such transfer is not so perfected prior to the filing of the petition in bankruptcy or of the original petition under Chapters X, XI, XII, or XIII of this Act, it shall be deemed to have been made immediately before bankruptcy."

Section 70c—Extent of trustee's title to bankrupt's property.

> "* * * The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists."

(3)



# Supreme Court of the United States

OCTOBER TERM—1942

No. 571

In the Matter

—of—

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of SURF ADVERTISING CORPORATION,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

## *BRIEF OF RESPONDENT, JOSEPH S. ABRAMS, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

JACOB M. ZINAMAN,
Attorney for Respondent Joseph S. Abrams.

Law Brief Press—NYC

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### *Statement of Controversy.*

The controversy involved the validity and effectiveness as against the Trustee in Bankruptcy of assignments of contracts and moneys due and to become due thereunder, given to respondent Abrams in connection with advances made and to be made by Abrams to Surf Advertising Corporation, the Debtor in Reorganization. These assignments were executed and delivered more than two years prior to the filing of the involuntary petition for reorganization of the debtor,

for present adequate considerations. The Referee in Bankruptcy, after full trial of the issues, held that under New York law said assignments were present effective transfers of choses in action and divested Surf of contractual rights in respect to the moneys to become due under said contracts; that no other action was necessary to perfect the complete transfer of those rights; and that the said assignments were not affected by the provisions of the Bankruptcy Act. This ruling was affirmed by the District Court and further unanimously affirmed by the Circuit Court of Appeals.

The trustee, petitioner, contends that, even though these assignments, expressly stated that Surf assigned to Abrams all of its right, title and interest in and to the said contracts and the moneys to become due thereunder, they nevertheless must be construed to be merely promises to pay out of future funds and could not confer any rights on Abrams, until the payments were made by the obligor under the terms of said contracts; that Abrams would not be entitled to any of the money which became due and payable during the period of four months prior to the bankruptcy because that would be a preference under Section 60a of the Bankruptcy Act.

### *Summary of Argument.*

1. No ground for writ of certiorari is shown because the Court below correctly held that the controversy herein involved only the interpretation of the New York law as applied to the construction, validity and effectiveness of assignments of contracts and the moneys payable thereunder; that said substantive law of New York does not conflict with the Bankruptcy Act; and that this Act does not impair the effectiveness of a valid assignment of moneys to become due under an existing contract.

2. The Court below correctly ruled that, since the assignments to respondent Abrams, under New York law, were perfected when they were made two years prior to bankruptcy and were good "against a bona fide purchaser," they were also good against "a trustee in bankruptcy," and therefore the Bankruptcy Act did not affect its decision.

## POINT I.

**No ground for writ of certiorari is shown because the Court below correctly held that the controversy herein involved only the interpretation of the New York Law as applied to the construction, validity and effectiveness of assignments of contracts and the moneys payable thereunder; that said substantive law of New York does not conflict with the Bankruptcy Act; and that this Act does not impair the effectiveness of a valid assignment of moneys to become due under an existing contract.**

The Circuit Court of Appeals by a divided Court first ordered a reversal of the judgment in favor of the assignee of the contracts directed by the trial Court, holding that the transaction did not constitute an assignment *in praesenti* of an existing contract, but a mere promise to pay funds to arise in the future and so void as against creditors (128 Fed. (2d) 564). Reargument being allowed and a number of the leading banks in New York being permitted to intervene, they filed a joint brief *amici curiae* seeking to vindicate the immemorial banking practice in New York of taking, as collateral for loans, assignments of existing contracts under which future payments would be made or earned. This reargument resulted in the Circuit Court unanimously reversing its first decision and in its affirming the judgment of the trial Court (129 Fed. (2d) 892). The careful and

full statement of grounds there made by Judge Augustus N. Hand is a complete answer to the petition for certiorari and should bring about a denial of the petition. Leave is taken however to show that the contentions of the petitioner are without merit.

The petitioner has entirely misconceived the purport of the unanimous decision of the Court below for he argues in several places that the Court below ignored and disregarded the Bankruptcy Act and relied only on the New York law which the petitioner says is in conflict with the Bankruptcy Act. A mere reading of the opinion of the Court below will completely refute these contentions for it pointed out "We cannot agree with Appellant's contention that Section 60a of the present Bankruptcy Act affects our decision." It then quotes from said section that "a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor and no creditor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein" (R. 372), and then states:

> "It has long been the New York law that such an assignment is good against a bona fide purchaser even though the bona fide purchaser is the first to give notice to the obligor (citing cases). The same thing is true of an execution creditor or of a trustee in bankruptcy (citing cases)."

The opinion therefore clearly demonstrates that this case involved only consideration of the New York law which in no wise conflicts with the Bankruptcy Act.

The decision sought to be reviewed herein followed the rule clearly enunciated in *Hiscock* v. *Varick Bank*, 294 U. S. 216, 55 S. Ct. 394, 79 L. Ed. 869, where this Court said:

"The contracts of pledge were made, executed and to be performed in the State of New York, and the rights of the parties were governed by the law of that state. * * * The questions of the extent and validity of the pledge were local questions, and the decisions of the Courts of New York are to be followed by this Court (pp. 37-38). * * * The contracts under which they were pledged were valid and enforcible under the laws of New York where the debt was incurred and the lien created. The Bankruptcy Act did not attempt by any of its provisions to deprive the lienor of any remedy which the law of the state vested him with; * * * " (p. 41).

See also: *Lerner Stores Corporation* v. *Electric Maid Bake Shops* (5th Cir.), 24 Fed. (2d) 780, 782; *In Re Knox-Powell-Stockton Co.* (9th Cir.), 100 Fed. (2d) 979, 982; *General Motors Acceptance Corporation* v. *Coller* (6th Cir.), 106 Fed. (2d) 584, cert. den. 60 Sup. Ct. 723, 309 U. S. 682, 84 L. Ed. 1026; *Matter of Talbot Canning Corporation* (D. C. Md.), 35 F. Supp. 680; *Associated Seed Growers, Inc.* v. *Geib, Trustee, et al.*, 125 F. (2) 683; *In re: Seim Construction Co.*, 37 F. Supp. 855 (D. C. Md., 1941).

*Prudence Realization Corporation* v. *Geist* (decided April 27, 1942, 62 S. Ct. 978, Advance Sheets of May 15, 1942) (p. b. 15) is clearly distinguishable. This Court, after referring to the New York cases on the issue therein involved, pointed out:

"Nothing decided in Erie Railroad Co. v. Tompkins, supra, requires a Court of bankruptcy to apply such a rule governing the liquidation of insolvent estates * * * we are unable to say that the rule laid down is other than one of state law governing relative rights of claimants in a state liquidation" (p. 95).

and

> "Since the New York rule, in the absence of an actual agreement to subordinate the guarantor, is merely a general rule of law governing insolvency proceedings it is not controlling in bankruptcy" (p. 97).

In the instant case the rule of New York was applied only to construe the effectiveness of an assignment of a contract.

The distinction between the *Prudence* case and the one at bar is clearly illustrated in *Prudence Company, Inc.*, 82 Fed. (2d) 755, cert. den. 298 U. S. 685, 56 S. Ct. 787, where the Court relied on and applied New York law in construing contracts existing between The Prudence Company, Inc., and Prudence-Bonds Corporation with certificate holders as contracts made, executed and to be performed in the State of New York, in spite of the filing of petitions for reorganization of each of these corporations in the Federal Court under Section 77B of the Bankruptcy Act. The Court there at page 757 said:

> "The contract was made and was to be performed in New York concerning trust property there. We adopt the construction of the highest court in that state as to its meaning and effect. Hiscock v. Varick Bank, 206 U. S. 28, 27 S. Ct. 681, 51 L. Ed. 945; Prudential Ins. Co. of America v. Liberdar Holding Corporation (C. C. A.), 72 F. (2d) 395."

For the same reasons *Jennings, Receiver,* v. *U. S. Fidelity & Guaranty Co.*, 294 U. S. 216, 55 S. Ct. 394, 79 L. Ed. 869 (p. b. 15) and *Yonkers* v. *Downey, Receiver,* 309 U. S. 590, 597, 60 S. Ct. 796, 84 L. Ed. 964 (p. b. 16) relating to National Banks are not applicable. The *Jennings* case

involved a direct conflict between state and federal law and the *Yonkers* case merely held that the state law did not authorize National Banks to pledge their assets.

## POINT II.

**The Court below correctly ruled that, since the assignments to respondent Abrams, under New York Law, were perfected when they were made two years prior to bankruptcy and were good "against a bona fide purchaser," they were also good against "a trustee in bankruptcy," and therefore the Bankruptcy Act did not affect its decision. The decision sought to be reviewed is not in conflict with decisions in other Circuit Courts.**

The real contention of the petitioner in the Court below was that, under the New York law, the assignments of the contract in question should be construed as mere promises to pay out of future funds, and as such were not enforcible against a trustee in bankruptcy as to moneys which became payable under said contracts within four months of the bankruptcy. That same argument is made under "Point II" of petitioner's brief herein and the cases cited and claimed to be in conflict with the decision in the case at bar involved agreements to pay out of particular funds or agreements or promises to make transfers or mortgages in the future. Firstly, these agreements did not involve assignments *in praesenti* of existing contracts, and secondly, those cases in any event cannot be said to be in conflict with the instant case because they also involved the application of state law as to the validity and effectiveness of assignments.

In each of the said assignments Surf, for valuable considerations therein set forth, stated that it "does hereby

sell, assign, transfer and convey unto you, Abrams & Co., all right, title and interest" in the said contracts and the moneys to become due thereunder. Then followed a description and identification of the contract and the terms thereof (R. 299-300). In addition, Surf delivered to Abrams the monthly invoices for the services rendered to the obligor and each of said invoices contained the endorsement "For value received this invoice is assigned to Abrams & Co.," and all checks issued by Calvert to Surf for the payments made under the said contracts were physically delivered to and deposited by Abrams (R. 301).

It is the well settled law of New York that such assignments of existing contracts and the moneys to become due thereunder are present effective transfers of choses in action and immediately divest the assignor's contractual right in respect of those moneys and no notice or further action is necessary in order to perfect the complete transfer of that right. *Kniffin* v. *State of New York,* 283 N. Y. 317 (1940) reargument den. 284 N. Y. 593, cert. den. 312 U. S. 690; *Williams* v. *Ingersoll,* 89 N. Y. 508; *Devlin* v. *Mayor, et al.,* 63 N. Y. 8; *Superior Brassiere Co. Inc.* v. *Zimetbaum,* 214 App. Div. 525; *Salem Trust Co.* v. *Manufacturers Finance Co.,* 264 U. S. 182; *In re: New York, N. H. & H. R. Co.,* 25 F. Supp. 874 (D. Conn. 1938).

The Referee and the District Court, on undisputed facts, found that there was a valid and adequate present consideration for the assignments in question (R. 304, 319). The assignments are, therefore, valid and enforcible against subsequent assignees, judgment creditors and trustees in bankruptcy. *In re Barnett,* 124 F. (2d) 1005 (C. C. A. 2nd, 1942); *In re: New York, N. H. & H. R. Co., supra,* page 7; *Kniffin* v. *State of New York, supra,* page 7; *McCorkle* v. *Herrman,* 117 N. Y. 297 (1889); *Niles* v. *Mathusa,* 162 N. Y. 546 (1900); *Bates* v. *Salt Springs National Bank,* 157 N. Y. 322; *Williams, et al.* v. *Ingersoll, et al., supra,*

page 7; *Hofferberth* v. *Duckett,* 175 App. Div. 480 (1916); *Harris* v. *Taylor,* 35 App. Div. 462 (1898), appeal dismissed 159 N. Y. 533; *Conley* v. *Fine,* 181 App. Div. 675 (1918); A. L. I. Restatement of the Law of Contracts, Sections 154, 161.

The purpose of an assignment, whether as a sale or as security, is immaterial in determining its validity and effectiveness as a transfer of contract rights. *In re*: *New York, N. H. & H. R. Co., supra,* page 7; *Niles* v. *Mathusa, supra,* page 8; Restatement of the Law of Contracts, Section 150.

An assignment of moneys to become due under an existing contract, while termed an "equitable" assignment for historical reasons, is, under the law of New York, both in equity and at law, a completed transfer of the assignor's right to receive those moneys when they become due, without any further act of either of the parties. *Superior Brassiere Co., Inc.* v. *Zimetbaum, supra,* page 7; *Williams, et al.* v. *Ingersoll, et al., supra,* page 7; *Hooker* v. *Eagle Bank of Rochester,* 30 N. Y. 83 (1864), where the Court, citing Section 111 of the Code as then in effect, said that "an assignment, valid as an equitable assignment is equally valid at law"; *M. Witmark & Sons* v. *Fred Fisher Music Co.,* 125 F. (2d) 949, 953 (C. C. A. 2nd, 1942); New York Personal Property Law, Sec. 41; Corbin, Cases on Contracts (2nd Ed.), pages 1019, *et seq.*

Not only is the transfer of rights completed by the assignment, but this transfer is "perfected," within the meaning of section 60a, at the time of the assignment, for the assignor thereby divests himself of all right and interest in or to the moneys to become due and no bona fide purchaser or creditor of the assignor could thereafter acquire any rights in the property transferred, superior to the rights of the assignee. *Salem Trust Co.* v. *Manufacturers Finance Co., supra,* page 7; *In re*: *Barnett, supra,* page 8; *Bates* v. *Salt*

*Springs National Bank, supra,* page 8; Hamilton, "The Effect of Section Sixty of the Bankruptcy Act Upon Assignments of Accounts Receivable" (1939), 26 Va. L. Rev. 168 at pp. 178 *et seq.*; Neuhoff, "Assignment of Accounts Receivable as Affected by the Chandler Act" (1940), 34 Ill. L. Rev. 538.

In passing it may be noted that on page 6 petitioner claims that the fund in question " 'was in the possession or under the control of the bankrupt at the date of bankruptcy' and therefore was impressed with a lien in favor of your petitioner * * * superior to that of the respondents." A similar contention is made on page 19. These assertions are erroneous, as may readily be seen from the opinion of Judge Leibell:

> "in November of 1939 (prior to the bankruptcy) Abrams had commenced a suit in the New York Supreme Court to recover from Calvert monies he claimed were due him under the several assigned contracts. Calvert moved to interplead the different claimants and the motion was granted. Before an order was signed the trustee obtained a stay and later all the parties, by stipulation, agreed to have their rights determined by the referee herein" (R. 318).

Pursuant to and for the express and limited purposes of that stipulation the moneys were deposited with the Clerk of the District Court (R. 317, 318). Subsequently, on the order of that Court the moneys in question were paid to Abrams. Under these undisputed facts the moneys were never in the control of the bankrupt.

On pages 33-35 petitioner cites three cases which considered Section 60a after the 1938 amendment. They do not support petitioner but rather are authorities for respondent and support the decision of the Court below.

In the *Matter of Talbot Canning Corporation* (D. C. Md.), 35 F. Supp. 680 (p. b. 33), the Court held: (1) That the claim of a creditor based on assignments was to be determined by the law of the state wherein the assignments were made (p. 685); and (2) "Referring to the objection that the subject matter of the contract in the present case was not in existence at the time the contract was made, it is sufficient if the contract itself was in existence" (p. 684).

Similar holdings were made in *Associated Seed Growers, Inc.* v. *Geib, Trustee, et al.*, 125 F. (2) 683 (p. b. 34), where the Court pointed out:

> "the validity of an assignment is to be tested by reference to the time when it is made, and if it is not preferential then it does not become so because the funds assigned came into the debtor's hands within four months of the bankruptcy. Union Trust Co. v. Townshend, 4 Cir. 101 Fed. 2nd, 903 (Cert. Den. 307 U. S. 646, 59 S. Ct. 1044; 83 L. Ed. 1526)."

That is precisely the ruling in the instant case now attacked by petitioner.

*In re: Seim Construction Co.*, 37 F. Supp. 855 (D. C. Md., 1941) (p. b. 35), the Court also held that the question whether an assignment became so far perfected that no bona fide purchaser from the bankrupt could subsequently have acquired any superior rights in the assigned funds, was to be determined by the law of Maryland, and that, since the assignee had not given notice as required by the law of Maryland, the assignment would be deemed perfected as of the date when the assignee filed his claim in the receivership proceedings, which was the first notice given to the obligor.

The application of state law on the question of the effectiveness of assignments is also illustrated in *Quaker City*

*Sheet Metal Co.*, 129 Fed. (2d) 894 (C. C. A. 3, 1942), where it was held that an assignment of accounts receivable will be deemed perfected according to the law of Pennsylvania where the assignment was made. Since under that law notice was required to be given to the obligor in order to perfect the assignment, and no such notice had ever been given, the assignment would be deemed perfected immediately before bankruptcy and hence would be security for an antecedent indebtedness within the meaning of Section 60a of the Bankruptcy Act.

See also: *In re*: *Imperial Brewing Co.*, 127 Fed. 2d, 766, 768 (C. C. A. 3, 1942); *in re*: *L. H. Duncan & Sons*, 127 Fed. 2d 640, 641-642 (C. C. A. 3, 1942); *Mutual Life Insurance Co.* v. *Menin*, 115 Fed. 2d, 975, 977 (C. C. A. 3, 1942), which arose subsequent to the enactment of the Chandler Act, wherein it was held that, in contests between the holders of assignments and trustees in bankruptcy, the validity and effectiveness of the assignments are governed by the law of the state where they were made.

## CONCLUSION.

**The issue decided by the Court below merely involved substantive State Law which did not conflict with the Bankruptcy Act and therefore there is no ground for a writ of certiorari and the petition for this writ should be denied.**

Respectfully submitted,

JACOB M. ZINAMAN,
Attorney for Respondent Joseph S. Abrams.

No. 571



# Supreme Court of the United States

OCTOBER TERM, 1942.

IN THE MATTER

OF

SURF ADVERTISING CORPORATION,

Debtor.

MAX ROCKMORE, as Trustee in Bankruptcy of Surf Advertising Corporation,

Petitioner,

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

Respondents.

## BRIEF OF RESPONDENT MATHILDE LEHMAN IN OPPOSITION TO GRANTING OF WRIT.

### POINT I.

### THE ORDER OF AFFIRMANCE SHOULD NOT BE REVIEWED AS TO THE RESPONDENT LEHMAN BECAUSE FACTUAL DIFFERENCES BETWEEN THE LEHMAN CLAIM AND THE ABRAMS CLAIM MAKE APPELLANT'S PETITION FOR REVIEW AND APPELLANT'S BRIEF IN SUPPORT THEREOF ENTIRELY INAPPLICABLE.

Respondent Lehman has consistently contended throughout this litigation that there were factual differences between the Lehman and the Abrams claims that necessitated the application of different principles of law to each of these claims.

The Lehman claim to a part of the fund in dispute arose from an assignment made by the Fiegel Advertising Co. Inc.

to Lehman, dated June 8th, 1938. The Fiegel Advertising Co. Inc. never went into bankruptcy and no petition for reorganization was ever filed against that Company. On March 23rd, 1939, the Fiegel Advertising Co. Inc. made an alleged assignment of the same contract theretofore assigned to Lehman, to the Surf Advertising Corporation. The assignment carried nothing with it since all rights thereunder had already been transferred to Lehman (*Salem Trust Co. vs. Manufacturers Finance Co.*, 264 U. S. 182).

On December 7th, 1939 the creditors of Surf Advertising Corporation filed an involuntary petition for reorganization. The Trustee of Surf claims that he holds the position of an execution creditor under Sec. 60a of the Bankruptcy Law. The Fiegel Advertising Co. Inc., the assignor of Lehman, was never in bankruptcy, and since Lehman's right to the fund stems from Fiegel, the Trustee of *Surf* could never be in the position of an execution creditor of Fiegel.

It is not conceded that the Trustee had any right to the fund even though he were in the position of a judgment creditor of Surf. The reasons advanced herein are in addition to those urged by the respondent Abrams.

## POINT II.

## ANSWERING OTHER QUESTIONS OF FACT AND ANSWERING BRIEF OF APPELLANT.

Counsel for the respondent Abrams is filing a separate brief in opposition to the granting of the writ. Respondent Lehman joins with respondent Abrams therein and asks that the Abrams brief be considered on behalf of this respondent as though the arguments therein were fully set forth herein.

Respectfully submitted,

LOUIS J. CASTELLANO,
Attorney for Respondent
Mathilde Lehman.

(2461)

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# Supreme Court of the United States

**OCTOBER TERM, 1942.**

**No. 571.**

In the Matter

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*Debtor.*

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*Petitioner,*

MATHILDE LEHMAN and JOSEPH S. ABRAMS,

*Respondents.*

## REPLY BRIEF BY PETITIONER.

DAVID HAAR,
*Attorney for Petitioner.*

THE COURT PRESS, N. Y. C.

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*Respondents.*

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## REPLY BRIEF BY PETITIONER.

(A) **As to Respondent Joseph S. Abrams.**

### POINT I.

**The case of *Quaker City Sheet Metal Company*, 129 Fed. (2d) 894, cited by respondent, is an additional reason for granting the petition.**

The brief filed on behalf of Joseph S. Abrams, respondent, emphasizes our argument, in support of our petition, and furnishes additional reasons for granting it.

We respectfully call the Court's attention to the case of *In re Quaker City Sheet Metal Company,* 129 Fed. (2d) 894, C. C. A. (3d) 1942, cited on the first line of page 12 of respondent Abrams' brief. The summary statement on that page of what the case decided is incorrect. What that case really decided is exactly what we are arguing here, namely that Section 60 of the Bankruptcy Law, as amended by the Chandler Act on September 22nd, 1938, must be taken into consideration with respect to assignments of accounts receivables, when the controversy is between the assignee and the trustee in bankruptcy of the assignor.

We respectfully urge this Court to read that case. It is extremely helpful in support of our argument.

In that case Quaker City Sheet Metal Company was in financial difficulties and obtained several loans from the Corn Exchange National Bank between January and April of 1940. On April 12th, 1940, one Dearden also made a loan to the company. With each loan, and as collateral security for it, the company assigned contracts, and the accounts receivable arising from the contracts. These assignments were made in Pennsylvania, with the knowledge of a creditors' committee. Neither the bank nor Dearden gave any notice of the assignment to the parties who owed money on the future accounts receivables so assigned.

On April 18th, 1940, an involuntary petition in bankruptcy was filed against the company. At that time the company owed the bank about $7900 and Dearden $1550. The bank filed a proof of claim as a secured creditor, and the trustee in bankruptcy objected. Dearden filed a petition for reclamation. Both claims were allowed by the referee in bankruptcy as secured claims, and the District Court

affirmed the orders. The trustee in bankruptcy appealed to the Circuit Court.

We state the problem from the opinion of the Court:

> "The trustee concedes the indebtedness, but contends that the assignments are voidable preferences by virtue of subdivisions (a) and (b) of Section 60 of the Bankruptcy Act as amended, 11 U. S. C. A., Sect. 96, subs. (a), (b)."

The Court will observe right at the outset the similarity in the controversy between that case and our own. Likewise, the Court will observe that in that case, as well as in our own, the trustee challenged the validity of the assignments, on the ground that they were preferences under Section 60 (a) and (b).

It was the effect of the amendment to Section 60 that the case proceeded to discuss and decide. Without going into the very interesting discussion of Circuit Judge Maris in his opinion, it is sufficient to state that the Court did discuss Section 60 (a) and (b) in relation to the assignment, which, of course, was valid between the assignor and the assignee under the Pennsylvania law, but which was challenged as between the trustee in bankruptcy of the assignor and the claimant assignee. In its discussion, the Court considered the meaning of the word "transfer", and when it became effective. It said:

> "On the contrary, it is obvious that the time of the making of a transfer is the essential element in determining whether a debt on account of which it is made was antecedent to it."

The Court then proceeded with this conclusion, as follows:

> "We conclude that the rule laid down in the second sentence of subdivision (a) of section 60 for determining the time of the making of a transfer applies to the determination of the question whether the transfer was made for or on account of an antecedent debt. *In this conclusion we are supported by students of the act who have forcefully pointed out that the purpose of Section 60, sub. (a), as amended by the Chandler Act of 1938, was to strike down secret liens even though given for a present consideration.*"
>
> *Quaker City Sheet Metal Co.*, 129 Fed. (2d) 894 (C. C. A. 3 1942).

In a footnote the Court refers to Prof. McLaughlin's article on "Aspects of the Chandler Bill to Amend the Bankruptcy Act" (1937), 4 U. of Chicago L. Rev. 388; Mulder, "Ambiguities in the Chandler Act" (1940), 89 U. of Pa., L. Rev. 10, 25; 3 Collier on Bankruptcy, 14th Ed., Sec. 60.48.

The Court ultimately decided that in view of Section 60 of the Bankruptcy Act, a preference was created because all of the elements of a voidable preference were present. The order of the District Court was reversed.

There was a dissenting opinion by Circuit Judge Jones, in which he, too, discussed the purpose and intent of Section 60 of the Bankruptcy Act, as amended by the Chandler Act.

All of this bears out our contention, not that the decision was right or wrong, because that is not in issue on this petition, but that there is a question of

law for this Court to answer. This is particularly true in the light of the foregoing case referred to by our opponent, and in the light of the several cases referred to by us in our main brief, when we know that the decision of the Circuit Court of Appeals for the Second Circuit in reversing itself said, as clearly as anybody can say it, that they were not considering Section 60 (a) at all in making their determination, even though the trustee argued its applicability to the facts in the case.

We again respectfully ask the Court to read this case. It should be added to the other cases cited by us under Point III, page 32 of our main brief.

While the question of authorities is before us, may we respectfully point out that the other cases cited by Abrams' counsel on page 12, have nothing to do with the present issue. He refers to three cases, and asserts that "it was held that any contest between the holders of assignments and trustees in bankruptcy, the validity and effectiveness of the assignments are governed by the law of the state where they were made". We have examined the cases. We believe that counsel is quite mistaken in his statement of what they decide.

The case of *In re Imperial Brewing Co.*, 127 Fed. (2d) 766, 768, C. C. A. (3d), involves a conditional sales contract that was recorded. Therefore, there was no "secret lien" involved. The trustee has no title to the property covered by a conditional sale. There can be no claim of preference in such a case. The case is not in point.

The second case, to wit, *L. H. Duncan & Sons*, 127 Fed. (2d) 640, 641, 642, C. C. A. (3d), has nothing

to do with assignments. What it has to do with is the right to subrogation by a surety which had paid out money for laborers and materialmen after the contractor had defaulted in performance. The claim was against the state for moneys due for performance. The Court held the surety entitled to be subrogated under the circumstances involved in the case. Incidentally, a reading of that case will show that the Court followed the Federal law, because it so happens that the Federal law covering the rights of sureties to subrogation was the same as the law of Pennsylvania.

The third case, to wit, *Mutual Life Insurance Company* v. *Menin,* 115 Fed. (2d) 975, 977, is not a case in the Third Circuit, as cited, but is in the Second Circuit. Moreover, it has nothing whatever to do with assignments or with any claim of preference. It discussed the sale by a trustee in bankruptcy of the good will of a bankrupt, and what such a sale entails.

I have not examined the other cases cited by counsel for Abrams in his brief. They are practically a repetition of those referred to on the motion for reargument. If they are, they do not touch the point which we are urging, namely, the error by the Circuit Court in refusing to determine the issue in the light of Section 60 of the Bankruptcy Act, as amended, based on the facts of insolvency of the bankrupt and knowledge of insolvency on the part of Abrams at the time when he was attempting to enforce his claim under this alleged assignment.

It is therefore respectfully submitted that Abrams' argument is unavailing as a response to our peti-

tion based on the grounds of error urged in our first point (p. 15), to wit, that the Court below had not followed the ruling of this court, laid down in the case of *Prudence Realization Corp.* v. *Geist*, 62 S. Ct. 978, Advance Sheets of May 15, 1942, insofar as the Circuit Court declined to take into consideration the Bankruptcy Law, in a contest between a trustee in bankruptcy and assignees claiming under an assignment of moneys to be earned in the future under the contract, when the Court had a duty to decide the issue, not in the light of local law applicable between an assignor and the assignee, but in the light of the Bankruptcy Law applicable in a controversy between the trustee in bankruptcy and the assignee.

## POINT II.

**Respondent Abrams has not answered our argument under Point III, page 32.**

We have urged under Point III that our petition is proper and the writ should be issued, because the Second Circuit has decided a question of Federal law, which is not, but should be settled by this Court. We have pointed out that in the case of *Matter of Talbot Canning Corp.*, D. C. Md., 35 Fed. Supp. 680, the District Judge did consider Section 60 of the Bankruptcy Act, when raised as against an assignee of future accounts, and so did the District Judge in case of *In re Seim Construction Co.*, 37 Fed. Supp. 855, and now, we have our opponent's citation of the case of *Quaker City Sheet Metal Company*, 129 Fed. (2d) 894, which also considered Section 60 of the Bankruptcy Act on similar facts.

The District Court case may not be considered as authoritative. The Circuit Court case has not the strength that a unanimous decision might have since there was a dissent. There is no other decision that we could find bearing on the question. The law is new. It is a drastic change over the old provisions applicable to preferences. It is the embodiment of what its draftsman thought was an effort to strike down "secret liens". Whether they succeed or not is a question that this Court should decide. We believe that our case affords an opportunity for an authoritative interpretation of the new provisions of Section 60 since its drastic amendment in 1939 and for that reason we respectfully urge that the petition be granted.

## POINT III.

**Respondent has not answered our contention that the decision in question conflicts with decisions of other circuit courts on the subject of equitable liens.**

Point II of our main brief, page 25, has scarcely been answered. Yet it seems to us we have shown conclusively how conflicting are the opinions in other circuits with those of the Second Circuit in this case, even without the amendment of the Chandler Act. We call the Court's attention to the conflict indicated in the case of *Lone Star Cement Corp.* v. *Swarthout,* 93 Fed. (2d) 767, C. C. C. (4), on page 31 of our brief. The opinion cites and follows a decision of this Court as to what does and what does not constitute an equitable assignment, as distinguished from a promise to pay out of a fund to be created in the future (*Christmas* v. *Russell,* 14 Wall. 69, at 71).

The facts in the present case have not been quite accurately stated by our opponent in his brief, but we will make no further comment on that, because undoubtedly the Court already has the facts before it. The chief thing to consider is whether or not the Circuit Court, in changing its decision as it did, was, justified in doing so, in the light of the law as we have argued it. We believe that it did not, and we further believe that a consideration by this Court of the legal question involved not only is necessary, but imperative, in the light of the problem presented, and the importance of getting an early decisive opinion as to whether or not Section 60, as now drawn, is effective to strike down secret liens.

(B) **As to Respondent Mathilde Lehman.**

The respondent Lehman appears to rely upon Abrams' brief. To that extent, we believe we have discussed the points in the preceding argument, and nothing further need be added.

However, she raises the point again (which, of course, goes to the merits and not to the question as to whether the petition should be granted), that she got her assignment from Fiegel Advertising Company, and not from Surf. She cites *Salem Trust Company* v. *Manufacturers Finance Co.,* 264 U. S. 182, for the proposition that, having gotten the assignment, she could rest secure for the remainder of her life, and get her money, and interest from even a subsequent purchaser, or its trustee in bankruptcy.

The *Salem Trust Company* v. *Manufacturers Finance Co.* case does not decide that at all. We do

not argue that, as to Fiegel, Lehman obtained rights which might be paramount as against subsequent assignees, but they are not paramount as to subsequent purchasers for value without notice. Surf was a purchaser of the contract from Fiegel, without notice. Lehman notified Surf several months later of her claim, but that was too late. Lehman had no contract with Surf, and Surf was not obligated to work, and pay to Lehman, what Fiegel owed her.

At best, Lehman might consider herself in the light of a mortgagee with an unrecorded mortgage to personal property—to a machine let us say, which was bought by a person without notice of Lehman's unrecorded mortgage. If the purchaser uses the machine, and makes money out of it, that is no reason why the money that he makes out of it should be used to pay Fiegel's debt to Lehman. The debt still is Fiegel's, and not Surf's.

As we have shown, at best, Lehman may consider herself a creditor of Surf. If she does, she stands in no better position than Abrams, and probably, in a worse position. Be that as it may, it is now undisputed that Lehman knew, or had reasonable cause to know of the insolvency of Surf as of at least December 7, 1939. If that be so then she would be getting a preference under section 60. Hence the petition for certiorari is properly filed, even as against her, because the Court below refused to consider Section 60 of the Bankruptcy Act as applicable to the facts in her case too.

We believe that the reasons advanced by the respondents against granting the petition, are not persuasive. As the commentators on the law have told us, an attempt has been made for the last thirty-five years to break down the practice of secret liens.

Some Courts believe the effort has been successful. In the decision now sought to be reviewed, the Second Circuit seems to hold otherwise. This Court should therefore grant our petition, so that this important question may be passed upon, and conflict of decision eliminated.

Respectfully submitted,

DAVID HAAR,
*Attorney for Petitioner.*